

## TITLE 329 SOLID WASTE MANAGEMENT BOARD

LSA Document #05-234

### SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST PUBLIC HEARING

On September 19, 2006, the solid waste management board (board) conducted the first public hearing/board meeting concerning the development of new rules for the Environmental Stewardship Program and Comprehensive Local Environmental Action Network at 329 IAC 18. Comments were made by the following parties:

Richard M. Van Frank, Improving Kids' Environment (IKE)

Following is a summary of the comments received and IDEM's responses thereto.

*Comment:* Improving Kids' Environment (IKE) agrees that it is good public policy to encourage and recognize activities by public and private regulated entities that go beyond full compliance with all applicable regulatory requirements. After careful review of the second notice of rulemaking, IKE continues to have serious concerns about the eligibility and incentives aspects of the draft program. We are concerned that the adoption of this program, to the extent that it does not comply with EPA's expectations for Indiana delegated programs will jeopardize that delegation. IKE believes that the adoption and demonstrated implementation of an environmental management system, a strong compliance history, and a demonstrated commitment to environmental proactivity are essential eligibility requirements.

A program like this must be rigorous. The public relies on IDEM to ensure that regulated entities with pollution discharges either comply with all requirements or are compelled to do so through compliance and enforcement activities. A program that offers less regulatory attention to companies that may be responsible for significant amounts of toxic pollutants and is subject to dozens of complex technical and legal requirements must be rigorous to ensure that public health and welfare are fully protected. This means that eligibility criteria must be high.

IDEM's proposed program would allow entities into the program based upon a commitment for future action, not a demonstrated history of commitment to environmental stewardship. For example, the draft rule states that a company must have developed and implemented an environmental management system, but there's no requirement that the EMS have been in place for any amount of time that would demonstrate in fact that the company is implementing it correctly.

IKE believes that the rule must define substantial compliance more carefully. It appears IDEM is willing to consider, on a case-by-case basis, pretty much any compliance situation before deciding that an applicant is not eligible for the program. The commentor agrees with the provision in the current draft rule that certain past activities, ongoing noncompliance with a consent decree or an agreed order, must make a party eligible. (IKE)

*Response:* IDEM continues to have discussion with EPA Region 5 regarding this program. Both agencies are already working on a second draft of a Memorandum of Understanding for ESP to be signed by both agencies. All incentives, both those in rule and policy have been shared with EPA and discussed several times. EPA has never raised concerns relative to violating delegation agreements or authority for programs. Both ESP and CLEAN are environmental leadership programs. It is IDEM's position that those entities that have implemented an EMS and made a commitment to continuous environmental improvement through these programs have demonstrated environmental stewardship. Taking these steps is being environmentally proactive. The federal program (NEPT) has not successfully recruited small and medium-sized entities, largely due to the required "track record" of demonstrated performance. IDEM desires to convince Indiana entities, especially small and medium-sized businesses, that there is now incentive to take that next step in the evolution of managing their environmental responsibilities from basic compliance with the regulations to proactive environmental management and continuous improvement. For those willing to take this proactive step, joining such programs is a business decision. There must be value in joining such programs, available within a reasonable amount of time of making that decision. Both the EMS and environmental improvement initiatives must be approved and will be subject to annual evaluation by IDEM. The provision related to membership determinations was recently discussed again in an effort to better understand the

concern and consider this and other similar comments. It was determined that compliance situations are unique and moved through the enforcement process individually using agency discretion and policy, not rule. After further consideration, further defining compliance scenarios in rule is not feasible, hence, these determinations must be assessed using agency policy and discretion taking the particular, unique circumstances into consideration.

*Comment:* IKE does not object to providing incentives for recognition or more personal service to companies who go beyond the minimum requirements. The commentor supports the recognition of companies who are true environmental leaders. However, IKE is very concerned with the proposals of incentives regarding routine inspections. With the parameters of each regulatory program and federal guidance where applicable, IDEM has the discretion to direct more or less attention to individual sources. Even without an ESP or CLEAN program, IDEM inspectors can, and do, make judgments as to whether and when sources are inspected. IKE is concerned, however, that the program promises to lower routine inspection frequency. Of even more concern is the elimination of unannounced inspections. Unannounced inspections are critical to any compliance program. (IKE)

*Response:* This provision is not included in the rule, however, a response is being provided in an effort to explain the rationale behind this aspect of the program. Reducing routine inspection frequency for members of such programs is consistent with NEPT and other state programs. Other comments received regarding ESP indicate concern relative to limited agency resources. Reducing oversight of entities proven and committed to environmental stewardship allows the agency to focus these limited resources towards those sources in need of increased attention and resources to work on solutions to Indiana's environmental challenges. In regards to advanced announcement of inspections, not all members will desire to request this incentive. However, today, more and more facilities have one environmental manager overseeing numerous facilities. These member facilities and environmental managers have earned a mere 24-hour notice to ensure they are present or have arranged for proper representation at the facility. Currently, in an effort to ensure proper representation and inspection criteria, there are several inspection scenarios where advance announcement of the inspection is provided today, outside of ESP. It is IDEM's intent to ensure inspections of ESP facilities are credible and thorough. Proper representation is essential to such an inspection process.

*Comment:* At a recent public meeting, IDEM mentioned another possible incentive to companies participating in the program: Increase the access to agency personnel to discuss rules under development. This is completely inappropriate and would be extremely detrimental to the public rulemaking process. All parties, which include the public, should theoretically have equal access. (IKE)

*Response:* IDEM desires to increase participation by all interested stakeholders in the rulemaking process. In the spirit of these programs being a partnership with IDEM, the agency hopes to utilize these relationships to promote discussion of rulemaking and other agency initiatives.

*Comment:* Where are the resources, both in terms of personnel and money, coming from to support this program? If you are going to provide the services described, there must be personnel available to answer phone calls for members and do all of the other things they are being promised. How much is the agency budgeting to operate this program? We basically support the concept of this program, but we have some trouble with the implementation as proposed. (IKE)

*Response:* IDEM's Office of Pollution Prevention and Technical Assistance has been preparing to support this program since the First Notice of Rulemaking, over a year ago, by providing EMS and program specific training to additional OPPTA staff, outside the P2 program, should the need arise to provide additional resources. OPPTA received a grant from EPA to implement ESP and provide contractor assistance if needed. ESP will provide efficiency improvements for both the agency and members of the program. States with similar programs have increased overall agency efficiency as a result of these programs. IDEM's program has been designed to maximize agency efficiency and provide real business value to members.